IN THE

United States Court of Appeals

For the Ninth Circuit

No. 21235

CLAIROL INCORPORATED,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition to Review An Order of the Federal Trade Commission

PETITIONER'S BRIEF

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PETITIONER'S BRIEF

Statement of Issues

1. The pertinent portion of section 2(d) of the Robin-on-Patman Act, 15 U.S.C. §13(d), prohibits discrimination n promotional payments between customers who compete 'in the distribution" of the products to which such pay-nents relate.[1]

Petitioner sells hair care products of a chemical nature such as dyes and bleaches) to beauty salons, which use ip and destroy such materials in the course of their own

[1] Section 2(d) reads in full:

"It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities."

service activities, in the salon, of treating their patrons' hair. Respondent (Commission) has held that such beauty salons distribute petitioner's said products within the meaning of section 2(d). Petitioner (Clairol), on the other hand, maintains that they do not distribute or resell what they themselves consume in the course of performing their service function.

2. This case involved the principle of law that was decided by the Supreme Court in *F.T.C.* v. *Fred Meyer, Inc., et al.*, 390 U.S. 341 (1968), after filing of the petition herein. Accordingly, petitioner proposes a form of order on that issue which accords with that decision (*infra*, p. 28).

Statement of Case

The administrative proceeding below was prosecuted by the Commission, pursuant to Section 11 of the Clayton Act [38 Stat. 734, 15 U.S.C. §21], for alleged violation by petitioner of section 2(d) of the Clayton Act, as amended by the Robinson-Patman Act [49 Stat. 1526, 15 U.S.C. §13(d), as amended]. Petitioner seeks review by this Court, pursuant to section 11(c) of the Clayton Act [38 Stat. 734, 15 U.S.C. §21(c)], of the Commission's final order. Tr. 85-87.

There is no controversey between the parties as to the essential facts. The evidentiary record herein consists entirely of a stipulation between the parties. Tr. 9-43. With its attachments, it furnishes the basis of the hearing examiner's initial decision, the factual findings of which were adopted by the Commission.[2] Petitioner's fact references

[2] "Because of commendable cooperation between counsel and the hearing examiner, the record before us is confined to the facts stipulated by the parties and a number of documents attached to the stipulation. As a result, this proceeding, which might well have turned into a 'big' case, is characterized by a concise record and the resolution of Clairol's appeal does not hinge on a debate about the facts documented by the record, but, rather, the legal conclusions which may properly be drawn therefrom, namely, whether the respondent's promotional payments are within the remedial scope of the statute." Tr. 88.

will be drawn from the aforesaid three, Commission-approved documents.[3]

Clairol manufactures products for coloring human hair.[4] It sells them into two channels of distribution, sometimes referred to as 1) the beauty trade, and 2) the drug trade. In the first of these, the products reach the end of their road in beauty salons where professional hairdressers consume them in the course of performing their haircoloring services. This is a true consumption by the beauty salon, and—in its hands—the final destination of the products which Clairol has manufactured and sold, for they become completely decharacterized and destroyed at that point. Tr. 28-29 [St. 18].

The patron of the beauty salon pays to it a unitary charge for the total haircoloring service; not a purchase price for the Clairol product used up in the course thereof. Tr. 22-23, 29-30 [St. 11, 19A]. The charge for the hair-

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[3] The following abbreviations will from time-to-time be used herein:

"St.", followed by a number, for paragraphs of the stipulation of facts.

"Att.", followed by a number, to indicate a respectively numbered attachment to the stipulation of facts. The attachments have been identified as "Exhibits" in the exhibit files furnished to the court and bear the same identification numbers as the attachments.

"I.D.", followed by a number, for paragraphs similarly numbered in the initial decision.

"C.O.", followed by a number, to indicate the particular page in the mimeo copy of the Commission's opinion.

"Tr.", will stand for references to pages of the transcript of the record on this appeal.

[4] Those involved in this case are "Miss Clairol", "Clairol Creme Toner", "Loving Care", "Silk & Silver" and "Sparkling Color." Tr. 29-30 [St. 19A; Att. 10-38]. Their function and nature is indicated by the advertisements in evidence [Att. 10-41], and by certain descriptive literature. [Miss Clairol: Att. 101A, pp. 23-28; Clairol Creme Toner: Att. 101D, pp. 99-116; Loving Care: Att. 101G, pp. 137-138; Silk & Silver: Att. 101H, pp. 143-144; and Sparkling Color: Att. 101I, pp. 149-151].

coloring service is determined primarily by the amount of time and skill required of the hairdresser and the type, location and reputation of the particular salon; it is not, generally, keyed to the amount or value of whatever haircoloring products are used in rendering the service. Charges for haircoloring treatments during which the salon utilizes various Clairol products range from $3.50 to $50, compared with retail prices for the products themselves of $1.25 or $1.50. Tr. 29-31 [St. 19A, 20A].

The dollar and cents fact that women are willing to pay these substantial price differentials between professional and self-application attests to the importance in their minds of the technical, creative, and personalized services of the trained hair colorist which the salons provide.

> The hair colorist must possess not only a dexterity and skill in applying the necessary products and procedures, but also an artistic talent and creativeness with respect to the aesthetic, style, and fashion aspects of recommending a particular color for a particular woman, and an aptitude for combining (i.e., ''blending'') various shades in order to produce the one upon which the colorist and the patron have decided. Tr. 33-34 [St. 21B 1), 2)].
>
> The colorist must have a minimum educational training, ranging from 1000 to 2500 hours in beauty schools, or two years in vocational high schools; and, in at least 34 states, the District of Columbia and Puerto Rico, must pass a state or county administered test. Tr. 34 [St. 21C]. Approximately 50 to 100 hours of such schooling is devoted to haircoloring alone. In many cases senior students who are authorized to work in the clinics of the school complete an additional 100 hours of practical work. Tr. 34 [St. 21C 2)]. Even after receiving their licenses, many beauticians who intend to specialize in haircoloring attend further classes offered by leading manufacturers of haircoloring products, including Clairol. Tr. 35 [St. 21D 1) and 2)].

Salons, such as those located in fashionable department stores and hi-fashion type beauty salons, require their haircoloring experts to have a number of years' experience. As a rule, these specialists take with them to a new position their steady customers. Some of the very outstanding haircolorists earn as much as $20,000 per year, exclusive of their tips.

Basic service elements involved in haircoloring include:

Item: Selecting the proper hair shade for the individual, and choosing the correct Clairol product, or blend, to achieve it. Tr. 38-39 [St. 21E 4); Att. 101A, pp. 9-10, 24-43; Att. 101B; Att. 101C, pp. 63-64, 68-73, 214; Att. 101D, pp. 76-80, 86-87, 99-115; Att. 101F, p. 133; Att. 101G, pp. 138, 141; Att. 101H, p. 144; Att. 101I p. 150].

Item: Performing a skin patch test to determine whether the patron is allergic to the product. [Att. 101A, pp. 11-13; Att. 101C, p. 65; Att. 101D, p. 87; Att. 101G, p. 138; Att. 101H, p. 145; Att. 101I, p. 151].

Item: Performing a preliminary strand test to assure that the shade or blend of product selected will produce the expected color, and to determine the proper time for exposing the hair to the application in order to achieve the desired end result; and making any adjustments indicated if this test reveals that the original selection of blend and time is not the proper one. [Att. 101A, pp. 14-16; Att. 101C, p. 65; Att. 101D, p. 88; Att. 101F, p. 128; Att. 101G, p. 138; Att. 101H, p. 145; Att. 101I, p. 151].

Item: Applying the proper mixture in the proper manner. The procedures for doing this are too intricate to be summarized here, but are described in Att. 101A, pp. 16-17, 44-56; Att. 101C, pp. 65-74; Att. 101D, pp. 80-92, 116-125; Att. 101G, pp. 138-141; Att. 101H, pp. 145-147; Att. 101I, pp. 151-153.

Item: Problem solving. Tr. 38 [St. 21E 3); Att. 101B; Att. 101C, p. 214; Att. 101E; Att. 101G, final page; Att. 101H, final page; Att. 101I, final two pages; Att. 101J].

Beyond such basic haircoloring procedures, the hairdresser is called upon to perform more hi-fashioned and sophisticated techniques, such as picture framing, tortoise shelling, winging, frosting, tipping, streaking and blonde-on-blonde. More specific descriptions of these appear in the stipulation at paragraph 21E 2) (Tr. 36-38) and in Att. 101F.

The highly expert and personal service nature of salon hair coloring is further evidenced in the SEC listing application of Seligman & Latz, Inc., [Att. 42A-D], the major beneficiary of petitioner's advertising allowances (Tr. 14-15 [St. 5A])[5], as well as in many of the advertisements now before this Court.[6]

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[5] "As in other service industries, personal relations with individual customers are of great importance in the Company's business. An estimated 8,500,000 customers are currently served annually, of whom about 65% are repeat customers requesting appointments with specific hair dressers or stylists. The Company devotes considerable attention to careful selection, supervision and training of its salon employees." [Att. 42B].

"Because of the importance of providing its customers with fashionable hair styling, the Company also provides its salons with consultative styling advice through its own group of eleven traveling stylists. To increase further the competence of the salons' hair stylists and hairdressers, the Company maintains advanced beautician and hair coloring schools at its New York offices." [Att. 42D].

[6] "Let our expert color stylists create the hairdo and devise the precise shade of blonde for you." [Att. 25].

"Come in and let one of our expert colorists blend the shade of blonde that is most becoming to you." [Att. 26].

"Artistic hands added sparking strands of frost, . . ." [Att. 27].

"Our color artists formulate breathtaking blends of blonde and dramatic mutations all calculated to bring a new beautiful you into focus." [Att. 28].

In the drug trade channel the ultimate consumer is one who purchases the Clairol product at a retail establishment, such as a drug, variety or department store, for her own use at home. Tr. 25 [St. 17A 2)].

". . . custom-blended in the perfect type of Clairol color for you. Complimentary Clairol color consultations with our color specialists . . ." [Att. 30].

". . . blonding is our specialty! We'll choose *your* ethereal blonde shade from Clairol's shimmery galaxy of 26 Creme Toner shades . . ." [Att. 31].

"Just select your perfect color and we'll custom blend it from 13 silken-soft, shimmering shades." [Att. 32].

". . . Miss Clairol custom-blended by our talented staff to produce a new hair coloring just for you! Be your own blend of blonde . . . or almost any other color in the specturm . . ." [Att. 33].

"*Clairol makes blondes to order!* . . . aided and abetted by our Mr. Gerald. Be your own blend of blonde—or almost any other hair color in the spectrum . . . with a custom-blend shade of Miss Clairol. Mr. Gerald, master hair colorist, will lovingly create a very particular shade to suit your personality or change it!" [Att. 34].

"Clairol Color what flattery get your perfect shade in the luxury of our new salon. Want to be a dazzling Clairol Creme Toner Champagne blonde? A lustrous Miss Clairol Sable Brown? Or a just-for-you shade in between? Put yourself in the hands of our expert haircolorists—see the hair color of your dreams come true!" [Att. 35].

"Our master color-chefs will flavor your hair with light, luscious frosting. A flattering confection of fair, fair lights against your own true tones. The secret recipe? Ours alone! The exclusive ingredients? Clairol's." [Att. 36].

"Your enchanting Clairol haircolor—as blended by our experts—is as personally yours as your fingerprint!" [Att. 37].

". . . —the perfect artistry of our colorist— . . . Come in and let Mr. Garrison personally select a custom coif and color just for you." [Att. 37].

"White: Special lighting effects . . . achieved by the new art of our beige-white tinting. The artistry of this new idea, introduced to the Southwest by N-M's Mr. Josh, is the way soft, gentle strokes of pale white frame your face, bring marvelous luminosity to your skin. And the way Mr. Josh does it, Clairol's Picture Frame White coloring is so subtle, so effective, so feminine that you'll radiate a feeling of being an utterly lovely new woman. That idea is the calculated result of the whole process." [Att. 38].

Wholesalers function separately within each of the two trade channels. Tr. 9 [St. 1A-1B]. Clairol sells both to wholesalers [in each channel] and to selected salon and retailer chains. Tr. 9 [St. 1A-1B].

The Commission has found petitioner guilty of violating section 2(d) of the Robinson-Patman Act [7] in that petitioner grants advertising allowances to some of its beauty salon customers without doing so on a proportionally equal basis for others which compete with them in performing haircoloring services.

The question, therefore, is (a) whether such beauty salons distribute (rather than themselves consume) the products, and (b) if so, whether what they distribute is the product that petitioner originally sold to them.[8]

Summary of Argument

Petitioner will hereinafter show that beauty salons, when they do haircoloring, are performers of a personal service, not merchants distributing wares. During the course of their service they utilize petitioner's products as part of their supplies and equipment, much as a laundry uses detergents and bleaches. During the course of such use, petitioner's products are completely decharacterized and destroyed. These circumstances are at odds with the criteria for invoking section 2(d) of the Robinson-Patman Act, i.e., that the suppliers' favored and unfavored customers must be in competition with each other in 1) reselling 2) the products they have purchased from him.

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[7] Fn. 1, page 1, *supra*.

[8] Not only is competition in distribution by the supplier's favored and unfavored customers a prerequisite to violation of section 2(d); but also that it be competition "in the distribution of such products or commodities",—the word "such" referring back to "products or commodities manufactured, sold, or offered for sale by such [supplier]."

POINT I

Beauty salons, which utilize petitioner's products while performing the services for which their patrons pay, are consumers rather than distributors of such products.

"When a man indulges in a shave in a barber shop he is buying a service (the barber's skill and time); he is not buying shaving cream and shaving lotion. We buy shoe shines not shoe polish." *Mueller* v. *United States*, 262 F. 2d 443, 447-448 (5 Cir. 1958).

The Commission purports to find inapplicable this rather self-evident analysis, stating that Mueller did "not purport to definitively spell out criteria for determining whether a transaction is to be considered a sale under the Federal Trade Commission Act or any other statute." Tr. 99 [C.O. 10].

If anything, however, there is even less to be said for the case that a beauty salon's haircoloring service is a sale of materials, than that the barber sells shaving lotion or the bootblack his polish.

The extensiveness and expertness of the services required for haircoloring far exceeds what is involved in shaving or shining shoes. If, as *Mueller* indicates, the patron uses a barber or bootblack to spare himself the modicum of effort he would otherwise have to exercise for himself, the observation is all the more pertinent when one considers how much and the kind of work there is involved in haircoloring (*supra*, pages 4-6). Despite the Commission's rejection of *Mueller*, the point it articulates is certainly not inapplicable to haircoloring. If shaving lotion and shoe polish—some small amount of which at least is carried away in its original form by the patron—are not deemed to have been sold by the barber or bootblack, the argument that beauty salons so trade in Clairol products

is even paler. They are not carried away by the patron in even the minutest amount, for they have lost their identity in the haircolorist's hands. Tr. 28-29 [St. 18].[9]

They are not even like some dyes, which may coat or impregnate another material without losing its original chemical integrity.[10] They are more akin to bleaches, which by chemical interaction and alteration affect the color of a fabric. Like Clairol products, such bleaches are decharacterized and consumed in the hands of the laundry, and are not distributed to the person whose wash has been subjected to their processing. The supermarket may distribute bleaches; the laundry does not.

No vernier is needed, for this case, to "definitively spell out criteria for determining" where on the scale *Mueller* would distinguish purchase of services from purchase of products. Here, every factor which differentiates the two types of transaction lies further toward the service side than it did in the *Mueller* statement.[11]

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[9] The Commission's argument that *Corn Products* governs this situation will be treated with at page 20, *infra*.

[10] It would be difficult to treat seriously an argument that dyers are in the business of distributing dyes.

[11] As pointed out by the Commission (Tr. 98 [C.O. 10]), complaint counsel had cited *Mueller* as holding that the services there under adjudication included the sale of products. The basis for that contention appears at 262 F. 2d 448, where the court relied upon the following finding of fact by the Commission:

> "Paragraph two: In the course and conduct of his business, the respondent [appellant] for several years last past has been engaged in the sale and distribution of various cosmetic and other preparations for external use in the treatment of conditions of the hair and scalp, including sales of such preparations through use of them in connection with treatments administered in his various offices."

That finding, however, was by consent [see last sentence of paragraph VI of "Stipulation", page 79 of the Transcript of Record, filed with the Court of Appeals for the Fifth Circuit on June 23, 1958] and hence does not present a litigated determination by either the Commission or the court. It has little precedental value here.

To the same effect, in a case brought under the Robinson-Patman Act itself, it was held that a construction contract, even though it expressly provided for an adjustment of price depending upon the cost of specified brick to be used, was nonetheless a purchase of service rather than of commodities, and hence not within the reach of section 2(a) of the Robinson-Patman Act.[12]

Thus, what is basically a service contract or relationship is not brought within the ambit of the Robinson-Patman Act by virtue of the fact that performance contemplates utilization, and even transfer from one party to the other, of so substantial a commodity as the brick in a structure, notwithstanding the further facts that it does not lose its original character in the course of the transaction, and that the price to be paid for the services rendered is overly keyed to the cost and nature of the specific component.

If, then, the contract in *General Shale* was for the purchase of construction services rather than of brick, the one for professional haircoloring is to an even greater extent for the service and not for items the colorist uses in rendering it. A woman need not patronize a beauty salon, paying prices which range from $3.50 to $50 (Tr. 29-30 [St. 19A]) if what she wants is to become a distributee of

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[12] "While the contract provided that a credit would be given, or a charge made, to the [City of Louisville Municipal Housing] Commission, dependent upon whether the brick cost more or less than $20.00 per thousand, and also provided that the general bid would be decreased by $13,000 in case Speedbrik were selected by the Commission instead of brick and tile, nevertheless, the contract could not be said to be one for the sale of brick. * * * The agreement was not for a transfer of chattels, or the sale of personal property, but was clearly a construction contract. Because there was no sale of a commodity by the Struck Company, it could not be guilty of discrimination in the price of a commodity to the Commission." *General Shale Products Corp.* v. *Struck Construction Co.*, 132 F. 2d 425, 428 (6 Cir. 1942), *cert. denied*, 318 U.S. 780 (1943).

petitioner's products. She can buy them in a retail store for no more than $1.50. Tr. 31 [St. 20A].[13]

The fact that a woman can, if she wishes, obtain from a store the same products that a beauty salon uses, and apply them to her own hair rather than go to the salon for its services,[14] does not mean that the salon, as well as the store, is a distributor of the articles. One sells the product, the other a service. The very existence and nature of the choices the woman has available to her emphasize the difference between them. If she visits the retail store it is to purchase the product. If she patronizes the salon it is to avoid the work that would be involved in applying it herself, and to obtain the services of the salon in doing that for her. In one instance the woman is the vendee and consumer of the product; in the other it is the salon that uses it up in the operation of its service-type business, and which is hence its ultimate vendee and consumer.

The issue is virtually settled by the very manner in which the Commission itself poses the legal question: "The . . . questions presented to the Commission on Clairol's appeal are the following: "(1) Are beauty salons, when *in the course of rendering hair coloring services* to their patrons they *utilize* respondent's products, engaged 'in the distribution of' such articles within the meaning of Section 2(d) of the Robinson-Patman Act?" Tr. 89 [C.O. 2; emphasis ours].

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[13] The charges for the treatments incorporating haircoloring by a beauty salon, which are unitary charges for services and haircoloring products, may vary from $3.50 to a high of $50. The cost of respondent's products is not, as a general rule, the determinative factor in the amount charged by the salon, but such charges may be varied to cover additional product costs and services in those cases where the customer has particular hair problems or desires more elaborate services. Tr. 29-30 [St. 19A].

[14] Tr. 91-92 [C.O. 4-5].

POINT II

A. Evidence internal to the Robinson-Patman Act, augmented by precedential authority, establishes that the phrase "competing in the distribution of such products or commodities" in Section 2(d) contemplates resale of such products.

B. Precedential authority establishes that beauty salons engage in the sale of services not the resale of products.

A. Resale of product by customer required.

In *Corn Products Refining Co.* v. *F.T.C.*,[15] the Supreme Court said of section 2(e) of the Robinson-Patman Act:

> "The statute is aimed at discrimination by supplying facilities or services to a purchaser not accorded to others, *in all cases where the commodity is to be resold,* whether in its original form *or in a processed product.* The evils of the discrimination would seem to be the same whether the processing results in little or much alteration in the character of the commodity purchased *and resold.*" p. 744 (emphasis ours)

While it was section 2(e) that was under specific consideration in *Corn Products,* it is no longer possible to doubt that minor variations in language are devoid of substantive significance.

> "It seems clear, upon a study of these sections, that Sections 2(d) and 2(e) are companion sections and that distinctions between them should not be drawn merely because of the differences in terminology employed in each section." *State Wholesale Grocers* v. *Great Atlantic & Pacific Tea Co.*, 154 F.

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[15] 324 U.S. 726 (1945). The Commission, too, relies upon *Corn Products.* Discussion of that aspect of the case will be undertaken, *infra,* at page 20.

Supp. 471, 474 (N.D. Ill. 1957), *modified on other grounds,* 258 F. 2d 831 (7 Cir. 1958), *cert. denied,* 358 U.S. 947 (1959).

Note the discussion in Rowe, Price Discrimination Under the Robinson-Patman Act, § 13.9 "Reconciliation of disparities in Sections 2(d) and 2(e)" pp. 390-391 (1962, and Supp. 1965), which he introduces with the paragraph:

> "Although the text of Sections 2(d) and 2(e) contains a spate of semantic discrepancies, courts view these provisions as reciprocal bans of co-extensive scope irrespective of minor textual variations."

Revealingly, it does not even occur to Rowe, in listing the "semantic discrepancies", to mention the variants "distribution" and "resale". Corroborative of the fact that this is a difference which has not struck anyone as being meaningful (and especially pertinent to the issue here) are cases which use "resale" whether discussing 2(d) or 2(e):

> "Section 2(d) of the Robinson-Patman Act prohibits *payments* to one's customer as compensation for services or facilities furnished by the customer in connection with his resale of the merchandise unless the payments are available on proportionately equal terms to all customers competing in the resale." *Empire Rayon Yarn Co.* v. *American Viscose Corp.,* 238 F.Supp. 556, 560 (SDNY 1965), *revs'd on other grounds,* 354 F.2d 182 (2 Cir. 1965); see also *Exquisite Form Brassiere* v. *F.T.C.,* 301 F.2d 499, 500 (D.C. Cir. 1961), *cert. denied,* 369 U.S. 888 (1962); *Henry Rosenfeld, Inc.,* 52 F.T.C. 1535, 1544, 1545, 1548 (June 29, 1956).

The Commission, in any event, seems to have no quarrel with the proposition that sections 2(d) and 2(e) are to be read harmoniously. Tr. 101 [C.O. 13, n. 12].

Beauty salons may compete in the use or consumption of respondent's products, but not in their resale (*infra,* pages 17-18, 21-24).

Congress was cognizant enough of the differences between use, consumption, and resale to include them all expressly in section 2(a). Having unmistakably demonstrated such awareness, one can only conclude that it meant to exclude "use" and "consumption" from sections 2(d) and 2(e) when it limited them to "distribution" and "resale".

> "Thus, since Congress expressly demonstrated in the immediately preceding provision of the Act that it knew how to expand the applicable concept of competition beyond the sole level of the seller granting the discriminatory price, it is reasonable to conclude that like clarity of expression would be present in § 2(b) if the defense available thereunder were similarly intended to be broadly read . . . There is no reason appearing on the face of the statute to assume that Congress intended to invoke by omission in § 2(b) the same broad meaning . . . which it explicitly provided by inclusion in § 2(a); the reasonable inference is quite the contrary." *F.T.C.* v. *Sun Oil Co.*, 371 U.S. 505, 514-515 (1963).

The explicit inclusion of "use" and "consumption" in section 2(a), and their omission from sections 2(d) and 2(e) fits a consistent congressional pattern and governs the issue here under discussion. Congress undertook by the Robinson-Patman Act to deal only with injurious effects upon competition in the sale or resale of commodities. It displayed no intention to embark upon protecting competition in the performance of services.[16]

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[16] *Columbia Broadcasting System* v. *Amana Refrigeration, Inc.*, 295 F. 2d 375 (7 Cir. 1961); *General Shale Products* v. *Struck*, 132 F. 2d 425 (6 Cir. 1942), *cert. denied*, 318 U.S. 780 (1943); *Syracuse Broadcasing Corp.* v. *Newhouse*, N.D.N.Y., July 30, 1962 (not reported), *aff'd on other grounds*, 319 F. 2d 683 (2 Cir. 1963). See dictum in *Scott Publishing Co.* v. *Columbia Basin Publishers, Inc.*, 180 F. Supp. 754, at page 770 (W.D. Wash. 1959), *aff'd on other grounds*, 293 F. 2d 15 (9 Cir. 1961).

The contrary view—confined thus far to law review theorizing—is represented by and summarized in Blake and Blum, *Network Television Rate Practices*, 74 Yale L.J. 1339, 1376-1381 (July 1965).

By section 2(a) it regulated discriminations in the sale of products, even where their purchase was for use or consumption and not for resale, because it intended to deal in that section with primary as well as secondary line injuries.[17] The vendor's discrimination can adversely affect primary line competition with respect to his *sale of commodities,* even where his vendee is a user rather than a reseller thereof. Primary line injury, however, is not an object of concern in sections 2(d) and 2(e). The legislature dealt there only with competition at the customer's level. Hence, if that vendee uses or consumes the product, rather than resells it, competition in connection with the

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The knowledgeable congressmen Patman and Celler, however, have opined otherwise:

> Patman: "However, the word [commodity] is ordinarily used in the commercial sense to designate any movable or tangible thing that is produced or used as the subject of barter. This is the definition for the word 'commodity' used in the application of the Robinson-Patman Act." *Complete Guide to the Robinson-Patman Act* 33 (1963).
>
> Celler: "Inasmuch, however, as that Act [the Robinson-Patman Act] is apparently not applicable to the sale of services . . ." *Antitrust Problems in the Television Broadcasting Industry,* 22 Law and Contemporary Problems 549, 569-570 (1957).

So, too, did an important report of the House of Representatives:

> ". . . each network allows advertisers a variety of quantity discounts . . . Similar discounts in the sale of goods would constitute violation of the Robinson-Patman Act. * * * In its present form, however, the Robinson-Patman amendment apparently applies only to tangible commodities, and not to services . . ." Report of the Antitrust Subcommittee on the Television Broadcasting Industry of the House Committee on the Judiciary, 85th Cong., 1st Sess. 66 (1957).

Thereafter, the chairman of that committee, Rep. Celler, introduced H. R. 8277, 85th Cong., 1st Sess. (1957) to amend the statute by defining "commodities" so as to "include services, other than professional services, rendered by independent contractors." 103 Cong. Rec. 9898 (1957).

[17] E.g., *Samuel H. Moss, Inc.* v. *F.T.C.,* 148 F. 2d 378 (2 Cir. 1945), *cert. denied,* 326 U.S. 734 (1945), *second petition for rehearing denied,* 326 U.S. 809 (1946).

sale of a commodity at the secondary level is not present to be protected, and, in line with its over-all concept, the congress did nothing to protect the service competition of such non-vending customers.

That is precisely the situation here. Beauty salons (the secondary line of competition) use and consume petitioner's products. They sell their own services, not petitioner's commodities. Their service competition is of the nature that the congress did not attempt to reach in section 2(d). Had it wanted to do so, it could, in the pattern of section 2(a), simply and clearly enough, have written the last phrase of section 2(d) to cover competition "in the use, consumption or distribution of such products or commodities."

B. Beauty salons do not resell petitioner's products.

The contrast between two product liability cases involving Clairol products highlights the service rather than distributional nature of a beauty salon's business. *Graham* v. *Bottenfield's Inc.,* 179 Kan. 68, 269 P. 2d 413 (Sup. Ct. Kan. 1954) held that the manufacturer and the wholesaler who sold the product to the salon for its use were in sufficient sales privity with the salon's customer that they could be sued by her for breach of warranty. The salon itself was not joined as a party in that action.

Where such an action was brought against a salon, however, it was dismissed on the ground that the salon, unlike the manufacturer or the wholesaler, performed services and did not sell goods.[18] The court referred to analogous decisions in the interesting line of cases involving blood transfusions received by patients in the course of medical care and treatment in hospitals. E.g., *Perlmutter* v. *Beth David Hospital*, 308 N.Y. 100, 123 N.E. 2d 792 (1954).[19]

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[18] *Epstein* v. *Giannattasio*, 25 Conn. Sup. 109, 197 A. 2d 342 (Ct. of Com. Pleas 1963).

[19] More recently, *Payton* v. *Brooklyn Hospital,* 21 A.D. 2d 898, 252 N.Y.S. 2d 419 (2nd Dept. 1964), *aff'd*, 19 N.Y. 2d 610, 224 N.E. 2d 891 (1967).

Even more pertinent to the within proceeding was the court's citation of the authorities that "Building and construction transactions which include materials to be incorporated into the structure are not agreements of sale."[20] They tie in directly with the holding in *General Shale Products Corp.* v. *Struck Const. Co.*[21] that such contracts are not governed by the Robinson-Patman Act.

The consistency with which beauty salons are viewed by the law as purveyors of services rather than distributors of the products with which they work is preserved in their classification as "service establishments" under the Fair Labor Standards Act of 1938. In *Fleming* v. *A. B. Kirschbaum Co.* [22] the Court of Appeals cited with approval the suggestion in *Wood* v. *Central Sand & Gravel Co.*[23] that by service establishments congress meant such operations as "barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries, automobile repair shops." (124 F. 2d at pp. 572-573.)

Similarly, in *Stucker* v. *Roselle*[24] the court, applying the Fair Labor Standards Act, stated:

> ". . . for the purposes of this case we can follow the definition given by Interpretative Bulletin #6 . . . in which it is stated 'typical examples of service establishments . . . within the meaning of the exemption are restaurants, hotels, laundries, garages, barber shops, beauty parlors and funeral homes.' In the foregoing examples service is given to customers as the chief business of the concern rather than as an incidental part of the business, or work or labor is performed upon the person of the customer or upon property which the customer has left for for such service to be given to it." (37 F. Supp. at p. 867.)

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[20] 25 Conn. Sup. at p. 113, 197 A. 2d at p. 345.

[21] *Supra,* page 11.

[22] 124 F. 2d 567 (3 Cir. 1941). *aff'd sub nom., Kirschbaum Co.* v. *Walling,* 316 U.S. 517 (1942).

[23] 33 F. Supp. 40, 47 (W.D. Tenn. 1940).

[24] 37 F. Supp. 864 (W.D. Ky. 1941).

POINT III

The Commission's arguments are untenable.

The Commission's decision must stand or fall upon the reasons relied upon for it by the Commission itself. As stated by the Supreme Court:

> "Although Board counsel in his brief and argument before this Court has rationalized the different unit determinations in the variant factual situations of these cases on criteria other than a controlling effect being given to the extent of organization, the integrity of the administration process requires that 'courts may not accept appellate counsel's *post hoc* rationalizations for agency action * * *'." Burlington Truck Lines v. United States, supra, 371 U.S. at 168; see Securities & Exchange Comm'n v. Chenery Corp., 332 U.S. 194, 196. For reviewing courts to substitute counsel's rationale or their discretion for that of the Board is incompatible with the orderly function of the process of judicial review. Such action would not vindicate, but would deprecate the administrative process for it would 'propel the court into the domain which Congress has set aside exclusively for the administrative agency.' Securities & Exchange Comm'n v. Chenery Corp., supra, at 196." *N.L.R.B.* v. *Metropolitan Life Insurance Company,* 380 U.S. 438, 443-444 (1965).[25]

A. The Commission's decision depends upon there being a resale of Clairol products by the beauty salon to its patron.

Turning analytically to the Commission's opinion, one concept emerges as the heart, the core and the predicate of its decision that Clairol's advertising allowances to

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[25] Similarly, in *Tri-Valley Packing Assn.* v. *F.T.C.*, 329 F. 2d 694 (1964), this Court ruled, when Commission counsel raised a new theory to support the Commission's decision on appeal, that the Commission should "deal first with this question on the facts and law", and remanded the case for that purpose (at page 706).

beauty salons violate section 2(d) of the Robinson-Patman Act: namely, that the beauty salon *does* sell Clairol products to its patrons when it colors their hair. Thus, at page 5 of its opinion the Commission states, "Scrutiny of certain of the cooperative advertising under consideration in this proceeding makes it clear that it was designed to sell Clairol hair coloring products." Tr. 92.

Again, at the end of footnote 11 on page 13 of its opinion (Tr. 101), the Commission observes that it deems "crucial" the "evidence indicating that Clairol viewed the beauty salons as part of its chain of distribution . . .".

Most revealing, perhaps, is the Commission's total reliance upon *Corn Products Refining Co.* v. *F.T.C.,* 324 U.S. 726 (1945),[26] a case in which the supplier's product, as originally purchased by its customer was, in fact, resold by the latter in its original chemical character, albeit hidden in a larger product.[27]

Finally, the Commission does posit its case, at pages 16-17 of its opinion (Tr. 105), in the following direct terms: "For the reasons stated above, we have found that the hair preparations in question were not sold to beauty

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[26] C.O. 9, 12-16 (Tr. 97, 101-105).

[27] In *Corn Products* the product for which advertising allowances were paid was dextrose, which the favored customer incorporated into its candy bars, and resold in that form, but still *as dextrose.* The candy bars (themselves products, not services) which the favored customer sold, were advertised to be "rich in dextrose". Tr. 102 [C.O. 13-14]. Thus, the commodity which the favored customer bought from the discriminator was resold (distributed) in the true and traditional sense of the word, since it was dextrose that was purchased and dextrose which was resold. The dextrose was not "lost", as the Commission implies at page 15 of its opinion (Tr. 103-104), or destroyed in the hands of the favored customer, as are the Clairol products (*supra,* pages 9-10). The importance to the decision of the resale *of dextrose* in the course of a *commodity vending* transaction is explicit in the quotation appearing at page 13 above.

salons by Clairol merely for use or consumption; rather, they were sold for resale or distribution.''[28]

It further emphasizes that it rests its decision in this case upon finding a true ''resale'' by the salons of Clairol's products, and not upon whatever sort of a transaction it might mean by one that ''may be equated with a resale''. Tr. 103 [C.O. 15, n. 13].

B. Beauty salons do not resell Clairol products to their patrons, within the usual and normal meaning of the word.

The difficulty with the Commission's conclusion is that it is substantively defective.

The elements necessary to a sale of Clairol products by a beauty salon to its patrons are plainly incomplete.

The hearing examiner's initial decision forthrightly restated the criteria, then sought to stretch the evidence to fit them.[29] The brief of Commission's counsel, submitted to the Commission on Clairol's appeal from the initial decision, reiterated the same contentions (at pages 14 and 15).

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[28] We have earlier shown that "resale" and "distribution" are to be read synonymously (*supra*, pages 13-14).

[29] "From what we believe to be the 'normal and customary meaning' of the word 'sale', a sale is a transaction which contains the following elements: a. competent parties; b. mutual assent; c. property in which title is transferred; and d. consideration, generally in the form of money paid.

"The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer. Although a unitary fee is paid for the application of the hair dye, and although the larger part of that fee is for the service rendered, nevertheless a part of the fee is unquestionably paid in consideration of the material or dye furnished. That part of the fee constitutes consideration for the sale of respondent's hair dye preparation." Tr. 73-74 [I.D. 21-22].

Clairol, however, had pointed out to the Commission, in its brief, that the key element of a sale (transfer of title to property) was lacking.[30]

The Commission, for its part, made no attempt at a frank measurement of the beauty salon's haircoloring transaction against the " 'normal and customary meaning' of the word 'sale' ".[31]

Instead it built upon equivocations to which the word "sell" is susceptible. For example, its statement, referred to at page 20 above, that the cooperative advertising "was designed to sell Clairol hair coloring products", is correct, of course, if one takes the verb in the sense it is used when speaking of a person's effort to "sell himself" to others, or of a company's endeavor to "sell" a good corporate image to the public.

Page 7 of the Commission's Opinion (Tr. 94), leaves no doubt that it indulges in just such a play upon the word. There, as purported evidence that "clearly" the salon is

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[30] "Here, fundamentally, is where the initial decision goes astray. In paragraph 61 it states 'The facts in our present case meet all the requirements of a sale. There are competent parties, mutual consent, money is paid, and *title to property in the form of hair dye or similar preparation is transferred from a beauty salon to a customer.*' The portion of this conclusion which we have italicized is substantively untenable. The salon's customer no more pays money to obtain a transfer of title to the chemicals which the hairdresser uses to change the color of her hair than she does for the soap that is used to shampoo it, the materials that are used to permanent wave it, or the spray that the operator uses to set it; or than does a man in a barber shop with respect to the shaving cream, talcum powder, witch hazel or scents the barber uses in serving him.

" 'Mutual consent' there is, and 'money is paid', but for the service and end result of having one's hair colored, not as payment or consideration to induce a transfer of title to property." (Br. p. 13, n. 19).

[31] To the contrary, it fudges with the statement ". . . decision cannot be made solely on the basis of the procedures followed in the salons. Tr. 92 [C.O. 5].

"to sell Clairol cooperatively", it cites (with its own emphasis supplied) a salon's reference to making "many new friends for both Clairol and ourselves". Making friends may be "selling" in the loose, lay sense referred to above; but it does not qualify as the resale of a product or commodity in any "normal and customary" jurisprudential contemplation.

The Commission was impressed with the fact that Clairol "viewed the beauty salons as part of its chain of distribution". Indeed, it viewed this as "crucial" to its decision. But this too is more of a play on words than a valid legal analysis; any rationale to which it is crucial must thereby be flawed.

Of course beauty salons are part of Clairol's chain of distribution!

So, too, are the women who buy its products in drug stores for their own use at home. Without them no earlier link in the chain would have any purpose. But that does not establish that they resell or distribute petitioner's products.

That any purchaser of Clairol's products is part of Clairol's total chain of distribution is undebatable. The pertinent question at this point, however, is whether he stands in that chain as a reseller or as a user. We submit that beauty salons are users (*supra*, Points I and IIB).

The Commission, on the other hand, lists certain facts to support its view that Clairol's cooperative salon advertising was intended to make beauty salons vendors of Clairol products.[32]

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[32] E.g., that the featuring and emphasis given to Clairol products in the cooperative advertising manifest an intention "to sell Clairol hair coloring products" (Tr. 92 [C.O. 5]), and "to sell Clairol to the prospective consumer" and "to enable the particular beauty salon to sell Clairol products" (Tr. 93-94 [C.O. 6]), and "to induce customers to ask for, and pay for, Clairol products in the salons" (Tr. 95 [C.O. 7]).

It can be conceded immediately that the objective of the advertising was to increase the volume of sales of Clairol's products. That, however, does not answer the question which is critical to this case: sales *to whom?*

Nothing to which the Commission points establishes anything more than that the purpose and effect of the cooperative advertising was to create a public preference for Clairol products which, in turn, would exert a marketing pressure upon beauty salons to purchase and use more of them. But it remains, nonetheless, use by the salons rather than vendition by them. Reverting to the analogy at page 10, *supra*: if a manufacturer were to advertise extensively "patronize a laundry that uses XYZ Bleach", that would hardly constitute the laundry a vendor of the bleach.

At the same time, however, the Commission cannot help slipping into the true description of the commercial purpose of Clairol's cooperative advertising program (which, incidentally, is completely harmonious with the juridical concept of the salon's relationships with its patrons as described by petitioner), for it concludes its factual resumé of this aspect of the case with the following significant summary: "The conclusion that the advertisements are designed to induce customers to ask for, and pay for, Clairol products in the salons must also be drawn from the copy requirements for Clairol advertising. For example, respondent insists that the name Clairol must appear in the headline of every ad, that it must be carried in a size and weight of type at least equal to the rest of the headline and that Clairol ads must feature *a salon service with a Clairol product* and that it must be clearly an ad which *sells the service incorporating respondent's product,* explaining what it is, and offering promise of beauty results." Tr. 95 [C.O. 7-8], emphasis supplied.

Thus, even the Commission ultimately sees that, when all is said and done, it is a *service* which the salon sells to its customers, and the objective and result of Clairol's advertising is to cause the salon in the course of rendering such service to *use* Clairol rather than competing products.

C. Congress intended to use the parallel words "distribution" and "resale" in sections 2(d) and 2(e) in their usual and ordinary sense of not including use or consumption.

The Commission's play upon the words "sell" and "chain of distribution" (*supra,* pages 22-23) is little more than a semantic doodle, and little less than a confession of substantive inadequacy.

It exposes the fact that a sale, in the ordinary sense of the word, is not to be found in the dealings between the beauty salon and its patrons. To do so requires a contortion of terminology.

Thus, we are inevitably brought to the real question, which is whether it must be held that congress intended to employ the words "resale" and "distribution" in a manner strange to the customary usages of the law.

It is fundamental in construing statutes that words are deemed to have been used in their ordinary and usual sense, unless there is strong and convincing evidence to the contrary.[33]

Customarily, "resale" or "distribution" do not embrace concepts of use or consumption. Clairol's beauty salon customers, for example, cannot be both consumers and resellers of the same product at the same time. It would require attribution to congress of uncommon—if not internally incompatible—usage of "resale" and "distribution" to hold that it intended to embrace within them both destruction and transfer of the same commodity.

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[33] "Generally speaking, the language in the Revenue Act, just as in any statute, is to be given its ordinary meaning, and the words 'sale' and 'exchange' are not to be read any differently." *Commissioner* v. *Brown*, 380 U.S. 563, 571 (1965).

"Reading the words to have 'their normal and customary meaning' . . ." *F.T.C.* v. *Sun Oil Co.*, *supra*, page 15 at 371 U.S. 514 (1963).

Evidence is not merely lacking that congress intended so to transmogrify the words. To the contrary, as pointed out at pages 15-17 above, it expressly distinguished between the functions of using, consuming and reselling in section 2(a), thus manifesting a clear intent to name and deal with them selectively and differentially; and placing them all into section 2(a) while specifying only the activity of resale where sections 2(d) and 2(e) are concerned.

D. Petitioner's authorities are in point that beauty salons' haircoloring service is not resale of the chemicals used, according to the usual and normal meaning of the word. The *Corn Products* decision is inapplicable to service situations.

Petitioner's authorities (*supra,* pages 9, 11, 17-18) illuminate the "normal and customary" concept of what does and what does not constitute reselling; and the "ordinary" understanding that must be attributed to that term in applying it to this case.

Whether or not they are "directly in point",[34] they do establish the common and traditional legal concepts (1) that beauty salons are engaged in a service and not a sales business, and (2) that tangible products utilized, or even transferred, during the course of performing a service function are not customarily deemed to have been the subject of a sale.

Directly in issue in this case is the legal status of a service transaction by beauty salons, during the course of which certain products are utilized and consumed by the performer of the services. Yet, the Commission rejects as not in point the only authorities which have been found to deal with service functions, and chooses, instead, to characterize as "most directly in point" a case which involves no service whatsoever, but deals solely with purchase and

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[34] Tr. 97 [C.O. 9].

resale of products as such (*supra,* page 20). The Commission goes so far, even, as to find *General Shale* "obviously distinguishable" and as having "no bearing" here. Tr. 101 [C.O. 13, n. 11]. The grounds stated for this rejection have already been discussed: namely, that Clairol, according to the Commission, considered beauty salons a part of its chain of distribution, whereas *General Shale* involved only a single instance rather than a continuum of relationships between the contracting parties. Regardless of how many or few times the transaction might be repeated, however, *General Shale* unmistakably held that, within the context and meaning of the Robinson-Patman Act itself, the transfer of property as tangible, specific, identifiable and substantial as the brick in a construction project is, nonetheless, not to be considered a sale of such property when it takes place as a component of what is essentially a contract for the rendition of services.

Such a holding, we submit, cannot be so summarily dismissed as having "no bearing" and as being "obviously distinguishable" where, as here, the question, also under the Robinson-Patman Act, is whether "distribution" and "resale" contemplate products which are used up and destroyed during the process of rendering a purely personal service.

The adamancy of the Commission, in a case involving the legal status of products used in the course of a service operation, against authorities directly treating that very question, and its ardent embrace, in preference to them, of a single case which had nothing whatever to say about a service business, can only remind one of Mr. Justice Frankfurter's piercing observation, "In matters of statutory construction also it makes a great deal of difference whether you start with an answer or with a problem."[35]

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[35] Frankfurter, "Some Reflection on the Reading of Statutes", 47 Colum. L. Rev. 527-529 (1947).

POINT IV

The Commission's order should in any event be conformed to the Supreme Court's *Meyer* decision.

In *F.T.C.* v. *Fred Meyer, Inc., et al.,* 390 U.S. 341 (1968), the Supreme Court held that a retailer who purchases from a wholesaler is a "customer" of that wholesaler's vendor of the product involved within the meaning of section 2(d) of the Robinson-Patman Act.

This marked a rejection of the Commission's theory in that case—and which is also expressed in the form of order now under review—that the wholesaler in such a situation (rather than his retailer vendee) is the customer who competes with retailers that buy directly from the same supplier. Accordingly, *Meyer* requires the following changes in the Commission's order herein (Tr. 85-87):

1. Clause 1(a) should be amended to make clear that the "retailer customer" and "retailer customers" referred to therein are all intended by the Commission to be retailers who purchase directly from Clairol.

2. Clause 1(b) should be changed to read:

> "Cease and desist from making or contracting to make any such payment to or for the benefit of any such retailer customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other retailers who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored retailer customer in the resale of respondent's hair care products to consumers for home use."

3. Clause 2(a) should be amended to make clear that the "customer" and "customers" referred to therein are all intended by the Commission to be beauty salons who purchase directly from Clairol.

4. Clause 2(b) should be changed to read:

> "Cease and desist from making or contracting to make any such payment to or for the benefit of any such customer who buys directly from respondent unless such payment is available on proportionally equal terms to all other beauty salons who purchase such products of respondent from wholesalers to whom respondent has sold such products, and who compete with the favored beauty salon customer in the rendering of hair care services and the use of respondent's hair care products."

The changes referred to for clauses 2(a) and 2(b) will, of course, be moot if the position set forth by petitioner in its preceding points herein is sustained.

Conclusion

Section 2(d) of the Robinson-Patman Act does not apply to petitioner's cooperative advertising program with beauty salons, because they do not resell petitioner's products.

Therefore, the Commission's cease and desist order should be modified by striking therefrom clauses 2(a) and 2(b), and by revising clauses 1(a) and 1(b) to conform with the Supreme Court's decision in *Meyer*.

Respectfully submitted,

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